## SUPREME COURT OF APPEALS OF VIRGINIA.

CITY OF NORFOLK *v.* J. W. PERRY CO. *et al.*

March 12, 1908. Rehearing Denied.

[61 S. E. 867.]

**1. Landlord and Tenant—Perpetual Lease—Liability for Taxes.**—In the case of a perpetual leasehold at a fixed rental, the tenant, who is the virtual owner, will, in the absence of provision to the contrary, be charged with the burden of taxation.

**2. Same—Lease—Provision for Payment of Taxes—"Public Taxes."**—Provisions in a lease, renewable forever, that the lessee and his assigns shall pay the "public taxes" which shall become due on the land, includes, not only state taxes, but municipal taxes, though the latter were unknown when the lease was made.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5824.]

**3. Taxation—Forfeiture of Power.**—Mere nonuser by a government of its power to levy a tax, however long continued, is not a forfeiture of the power to levy it.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 45, Taxation, §§ 61, 62.]

**4. Municipal Corporations—Power to Tax Own Property.**—A city, having general powers of taxation, has power, as has the state, to tax its own property, especially where it is practically the holder of the mere legal title, having given a perpetual leasehold at a fixed rental, the lessee to pay the public taxes which shall be levied on it.

**5. Taxation—Injunction—Remedy at Law.**—Even if in case of a perpetual lease of land at a fixed rental, the lessee to pay the taxes, the buildings put on the land by the lessee should not be assessed in his name, but they, as well as the taxes on the land, should be assessed in the name of the lessor, yet he not be prejudiced by the mode of assessment, and there being adequate remedy at law, by motion, to have the assessment corrected, any such error in assessment is not ground for having collection of the taxes enjoined.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 45, Taxation, §§ 1235, 1238, 1239.]

Appeal from Circuit Court of City of Norfolk.

Suit by the J. W. Perry Company and another against the city of Norfolk to enjoin collection. Decree for complainants. Defendant appeals. Reversed, and bill dismissed.

*Jas. F. Duncan* and *Nathaniel T. Green,* for appellant.
*W. L. Williams and Tazewell Taylor,* for appellees.

HARRISON, J. In the year 1792 the appellant, then the borough of Norfolk, was the owner of an area of land within the limits

of the present city of Norfolk. In that year it laid off this land into lots, and leased the same to various individuals for 99 years, renewable forever. Among these leases was one executed in June, 1797, by which there was leased to one Richard Evers Lee lot No. 10, at an annual rental of £6 15s., or $22.50 in United States money, the lessee, as a further consideration, covenanting for himself, his executors and assigns, to "pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land." This lease was for a term of 99 years, renewable for a further term of 99 years and so on forever.

In May, 1895, before the expiration of the original lease, the city of Norfolk, in accordance with its terms, executed a renewal thereof to the executors of Caroline F. Hare, she having been in her lifetime the owner of all the rights of the original lessee. This renewal lease contained the same terms as the original lease.

By successive assignments the property covered by this lease has passed to and become vested in the appellees J. W. Perry Company and John F. Roper, who have improved the same by the erection of valuable buildings thereon.

This property has been assessed for taxation by the state, and such taxes have been regularly paid, without protest. In the year 1906 the land was assessed for taxation at $21,000, and the buildings thereon at $6,500. The land was assessed for that year in the name of the city of Norfolk, and the buildings thereon in the name of the appellee J. W. Perry Company.

In the year 1906 the city of Norfolk imposed a tax of $346.50 on the land, and a tax of $107.25 on the buildings. Thereupon the appellees filed this bill for an injunction against the collection of these taxes by the city of Norfolk, upon the ground that they were illegal, and in contravention of the contract under which they claim. A temporary injunction was awarded, which was followed by the decree appealed from perpetually enjoining the city of Norfolk, its agents, etc., from the collection of the taxes complained of.

While technically the relation of landlord and tenant exists between the city of Norfolk and the appellees under the terms of the contract of June, 1797, to which we have adverted, it is manifest that the appellees are the substantial and real owners of the property upon which the tax in question is assessed. They have the right of possession, use, and occupation forever, upon payment of the stipulated rent of $22.50 per annum, and they can assign or devise the same, and their heirs will take in case there is no assignee or devisee. In all essential respects, so far as liability for taxes is concerned, appellees are in the position

with respect to this property that the ordinary fee-simple owner would be. It is true that, as a general rule, in the absence of a covenant, the landlord under an ordinary lease is responsible for taxes on the property leased by him; but this general rule can have no application to the case of a perpetual leaseholder, where the tenant is in effect the virtual owner of the property, and entitled to its use forever. In such a case certainly, for the purposes of taxation, the mere legal title remaining in the landlord will be disregarded, and the burden of taxation placed where it belongs—upon the lessee to whom the value and the benefit belongs.

As said by Mr. Justice Bleckley in a similar case, which is quoted with approval by the Supreme Court: "The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all land in the world. Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong should pay the taxes." Wells *v.* Savannah, 181 U. S. 531, 544, 21 Sup. Ct. 697, 702, 45 L. Ed. 986.

Looking to the official action of the governing body of the borough of Norfolk, in its ordinances or resolutions providing for these perpetual leases, which are recited in the lease contract under consideration, and to the terms of the contract itself, we fail to find any reference to the matter of exempting this property from taxation. Instead of such a stipulation, there is in the deed of lease made by the borough to the several lessees a clause directly negativing the idea that it was intended to grant a perpetual exemption of this property from the burden of taxation, borne in common by all other property holders. This clause obligates the lessee, "his executors, administrators, and assigns to pay or cause to be paid to the person or persons authorized to receive the same the public taxes which shall become due on said land."

The appellees insist that the term "public taxes" employed by the parties in this covenant had reference only to state taxes, and was not intended to include the city taxes now sought to be collected, because at that time a municipal tax on land was unknown. It might be argued with equal force that it could not have been contemplated by the parties, at that early day that the property now worth thousands of dollars in a large and rapidly growing city should bear no part of the common burden necessary to secure the innumerable advantages and benefits enjoyed by all the citizens of a well-regulated, modern municipality. The word "public" as applied to taxes in this covenant is broad enough to embrace the taxes then imposed, or which might there-

after be lawfully imposed, upon other landowners in that community. The word has no such fixed or settled meaning as necessarily to exclude city taxes from the term "public taxes." The word "public" is used variously, depending for its meaning upon the subjects to which it is applied.

In Buffalo City Cemetery *v.* City of Buffalo, 46 N. Y. 506, 510, the court says: "We think that the current of the authorities in this state and in some of our sister states runs to this result; that public taxes, rates, and assessments are those which are levied and taken out of the property of the person assessed for some public or general use or purpose in which he has no direct, immediate, or peculiar interest, being exactions from him toward the expenses of carrying on the government, either directly and in general that of the whole commonwealth, or more immediately and particularly through the intervention of municipal corporations."

We are of opinion that the covenant in the case at bar by the lessee to pay all "public taxes" which shall become due on the land not only covered taxes imposed at the time of the lease, but all taxes arising in the future that might be assessed by any lawful authority.

The appellees insist that the interpretation of the contract of lease suggested by them is evidenced by the conduct of the municipal authorities in failing to tax the property in the past. Mere nonuser by a government of its power to levy a tax, it matters not for how long continued, can never be construed into a forfeiture of the power. Whatever the practice of the city hitherto may have been, the mandate of the Constitution is that all property shall be taxed save that exempt by constitutional authority, and that all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Const. 1902, §§ 168, 183. That this mandate may have been heretofore disregarded is no reason why it should be disobeyed now. Wells *v.* Savannah, *supra.*

Based upon the contention that the property here involved belongs to the city as lessor, it is insisted by the appellees that the city of Norfolk has no power to tax its own property. Ordinarily the state does not tax its own property, but it has the power to tax it if it sees fit to do so. Cooley on Taxation (3d Ed.) p. 263. And this would be true also of a city having general powers of taxation, as the city of Norfolk has. Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959.

The reason governments of a state or city do not tax their own property is that it would render necessary new taxes to meet the demands of such a tax; and thus the public would be

taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. Cooley on Taxation, *supra.*

If, however, it were true that a city could not tax its own property, the rule would not apply in this case, for the reason that here, as already seen, the city is practically the holder of the mere legal title, while the appellees are the substantial and beneficial owners. Here the collection of the taxes would not be a vain thing, because the city does not pay the taxes, but they are paid by the lessee of the perpetual leasehold estate, who is the virtual owner, and the city gets the benefit of such taxes in common with all other taxes collected by it.

It is further contended by the appellees that the buildings put upon the land by the lessees cannot be assessed separately in their names, but that the land and buildings should be assessed together in the name of the lessor.

If it were conceded that the mode of assessment adopted was wrong, and that suggested by the appellees proper, it would be harmless error. The city had, under the law, to tax the property at the same rate that was imposed upon other real estate within its territorial jurisdiction, based upon its valuation in assessing for purposes of state taxation. It is not claimed that the taxes would be less if the mode of assessment suggested by the appellees was adopted, nor is it perceived that the mode of assessment objected to has in any way affected or prejudiced their rights. If having both the land and the buildings assessed in the name of the lessor be of advantage to the appellees, and they have the right to have them so assessed, their remedy at law, by motion, is adequate to have the assessment corrected in that particular.

For these reasons we are of opinion that no right of the appellees under their lease contract has been violated by the tax imposed by the city of Norfolk, and therefore the decree appealed from enjoining the collection of such tax is erroneous, and must be reversed. And this court proceeding to enter such decree as the circuit court should have entered, it is ordered that the temporary injunction granted herein be dissolved, and that the complainants' bill be dismissed.

Reversed.

**Note.**

**Duty to Pay Taxes as between Landlord and Tenant.**—The rule is well settled in this country and in England, that in the absence of agreement or special covenant, the duty rests upon the landlord to pay all county, municipal and state taxes and assessments which become chargeable upon the premises during the term of the lease. Freeman *v.* State, 115 Ala. 208, 22 So. 560; McFarland *v.* Williams, 107 Ill. 33; Clinton *v.* Shugart, 126 Iowa 179, 101 N. W. 785; Connell

*v.* Female Orphan Asylum, 18 La. Ann. 513; People *v.* Barker, 153 N. Y. 98, 47 N. E. 46. See Purssell *v.* New York, 85 N. Y. 330 (reversing 43 N. Y. Super. Ct. 348); Trinity Church *v.* Cook, 11 Abb. Pr. 371, 21 How. Pr. 89; Caldwell *v.* Moore, 11 Pa. St. 58; Mattson *v.* Oliver, 2 Leg. Op. 48; Biddle *v.* Blackburn, 5 Pa. L. J. 419. See also Gormley's Appeal, 27 Pa. St. 49; Morgret *v.* McNaughton, 3 Pa. Co. Ct. 606; East Tennessee, etc., R. Co. *v.* Morristown (Ch. App. 1895), 35 S. W. 771; Hart *v.* Hart, 117 Wis. 639, 94 N. W. 890; Dawson *v.* Linton, 5 B. & Ald. 521, 1 D. & R. 117, 7 E. C. L. 285; Watson *v.* Atkins, 3 B. & Ald. 647, 5 E. C. L. 372; Stubbs *v.* Parsons, 3 B. & Ald. 516, 5 E. C. L. 299; Carter *v.* Carter, 5 Bing. 406, 7 L. J. C. P. O. S. 141, 2 M. & P. 723, 30 Rev. Rep. 677, 15 E. C. L. 643; Jones *v.* Morris, 3 Exch. 742, 18 L. J. Exch. 477; Graham *v.* Allsopp, 3 Exch. 186, 18 L. J. Exch. 85; Taylor *v.* Zamira, 2 Marsh. 220, 6 Taunt. 524, 16 Rev. Rep. 668, 1 E. C. L. 736; Dove *v.* Dove, 18 N. C. C. P. 424.

On the other hand, however, the lessee is liable for any taxes that are levied on account of improvements put upon the land by him, even where there is no covenant by the lessee to pay taxes. Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Ct., 50 Md. 397; Walker *v.* Harrison, 75 Miss. 665, 23 So. 392; Leach *v.* Goode, 19 Mo. 501; Joslyn *v.* Spellman, 9 Ohio Dec. (Reprint) 258, 12 Cinc. L. Bul. 7; Watson *v.* Home, 7 B. & C. 285, 6 L. J. K. B. O. S. 73, 1 M. & R. 191, 31 Rev. Rep. 200, 14 E. C. L. 133; Smith *v.* Humble, 15 C. B. 321, 3 C. L. R. 225, 80 S. C. L. 321; Yeo *v.* Leman, 2 Str. 1191; Hyde *v.* Hill, 3 T. R. 377.

In the principle case there was an express covenant by the lessee binding himself, his executors and assigns, to pay all taxes that should become due on the land under the lease which was for a term of 99 years, but renewable forever. In such cases the rule is well settled that a lessee may by covenant or agreement contract to pay specified taxes or assessments, or all taxes or assessments which may be levied on the demised premises during the term, and clauses to this effect are now frequently inserted in leases. Hart *v.* Cornwall, 14 Conn. 228; Hammon *v.* Sexton, 69 Ind. 37; Gedge *v.* Shoenberger, 83 Ky. 91; Boutte *v.* Dubois, 11 La. Ann. 755; Derumple *v.* Clark, Quincy 38; Soulard *v.* Peck, 49 Mo. 477; Knight *v.* Orchard, 92 Mo. App. 466; Trinity Church *v.* Higgins, 48 N. Y. 532; Lehmaier *v.* Jones, 100 N. Y. App. Div. 495, 91 N. Y. Suppl. 687; Gridley *v.* Einbigler, 98 N. Y. App. Div. 160, 90 N. Y. Suppl. 721; Arthur *v.* Harty, 17 Misc. 641, 40 N. Y. Suppl. 1091; Davis *v.* Cincinnati, 36 Ohio St. 24; Fernwood Masonic Hall Assoc. *v.* Jones, 102 Pa. St. 307; Delaware, etc., Canal Co. *v.* Von Storch, 5 Lack. Leg. N. 89; Bacon *v.* Park, 19 Utah 246, 57 Pac. 28; West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696; Broadwell *v.* Banks, 134 Fed. 470; Semmes *v.* McKnight, 21 Fed. Cas. No. 12, 653, 5 Cranch C. C. 539; Parish *v.* Sleeman, 1 De G. F. & J. 326, 6 Jur. N. S. 385, 29 L. J. Ch. 96, 1 L. T. Rep. N. S. 506, 8 Wkly. Rep. 166, 62 Eng. Ch. 250, 45 Eng. Reprint 385; Payne *v.* Burridge, 13 L. J. Exch. 190, 12 M. & W. 727.

The rule applicable in the case at bar which was a perpetual lease would seem to be that applied to ground rents in Pennsylvania, where it is held that in all cases of land conveyed subject to ground rent, the two resultant estates in the land and in the rent are to be separately assessed; the owner of the rent is not liable for any of the taxes assessed on the land out of which the rent issues. Philadelphia Library Co. *v.* Inghan, 1 Whart. (Pa.) 72; Irwin *v.* United States Bank, 1 Pa. St. 349. And the owner of the ground is not liable for taxes assessed upon the land. Franciscus *v.* Reigart, 4 Watts (Pa.) 98; Robinson *v.* Alleghany County, 7 Pa. St. 161.